UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

WP COMPANY, LLC D/B/A THE WASHINGTON POST

and

Cases 05-CA-036485 05-CA-036574

WASHINGTON MAILERS' UNION NO. 29 PRINTING, PUBLISHING, AND MEDIA WORKERS SECTOR OF THE COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO

COUNSEL FOR THE ACTING GENERAL COUNSEL'S REPLY BRIEF

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Counsel for the Acting General Counsel respectfully submits this Reply to the Respondent's Answering Brief ("Answering Brief").

This case is quite simple. Section 14(b) stipulates: "The present practice providing for a coffee break, wash-up times, a break between doubleheader shifts, fifteen minutes for monthly chapel meetings, and time to get lunch when it is necessary to work through lunch shall be continued." (GC3 at 17-18). Judge Rosenstein found that a "small number of the 53 salaried foremen in the mailroom were not adhering to the provisions of Section 14(b), but the majority of foremen were doing so," and that this failure by some to abide by the requirement to give breaks to employees who worked through lunch was not a "material change." (ALJD at 5-6). The Respondent did not file cross-exceptions to the judge's finding that some employees have not been getting their right to a break after they work through lunch, and it is now too late to do so.

The method by which the Respondent has been violating the contract is through direct dealing, individual "deals" with employees to entice them to give up their Section 14(b) rights.¹

The Respondent's defense is premised on the fact that the Acting General Counsel chose not to file exceptions to the judge's finding that the Respondent did not unilaterally change its lunch policy. This statement is repeated ad nauseam throughout Respondent's Answering Brief. However, the judge found that a change was made – some of the Respondent's foremen are not affording breaks to employees after those employees have worked through lunch in violation of Section 14 of the contract. This is not surprising as the Respondent's only witness on this issue testified that she is not giving employees these breaks:

- Q: Is that still your practice, today, when you're asking people to work through lunch, that you would give them time if they asked?
- A. Yeah, if they ask, I would.
- Q. So you are still asking people to work through lunch and they don't get a break after that?
- A. No.
- Q. They don't get a break to eat?
- A. No.
- Q. That's your current practice?
- A. Yes.

(Jackson Tr. 188).²

Union official Jim Forsyth credibly testified that supervisor Joe Malenab told him, with Wanda Jackson present to confirm Malenab, that employees were being

¹ Respondent's Answering Brief engages in more than the usual amount of hyperbole common to many briefs filed with the Board, stating that the undersigned "blatantly misrepresented" the record. (Answering Brief at 24). The undersigned is satisfied that his reading of the record is more than fair and squarely supports a finding of a violation.

² Jackson's hypothesis that she "would" give employees a break, if they asked, is irrelevant. First, employees don't have to ask that their employer honor their collective-bargaining agreement – the law requires it. Second, her testimony is utterly speculative and has no relationship to her actual practice, that employees "don't get a break to eat."

asked to "volunteer" to work through lunch and give up their right to a break afterwards. The Respondent calls this a "blatant misrepresentation," but here is Forsyth's testimony:

- A. Yes. I approached one of the foremen for the afternoon shift, which is Allen Malenab -- Joe Malenab, excuse me. There's so many of them, I just mix names.
- Q. Where did you speak to Mr. Malenab?
- A. In his office. They have a lower mailroom office. And he has an office in that office.
- Q. Do you recall if anyone else was there?
- A. Initially, there was just me and Joe. And then he called in Wanda Jackson to confirm something.
- Q. What did you say to Mr. Malenab?
- A. I asked Joe what's going on. I said, Joe, you know we're supposed to get time to get lunch when it's required to work through lunch.
- Q. What did Mr. Malenab say?
- A. He said something about volunteering. People were volunteering, we ask people to volunteer to forego that whatever.
- Q. Did you have any response to that?
- A. Yeah, I said I never heard of anything like that before.

(Forsyth Tr. 50).

The Respondent cannot escape the fact that the method by which Respondent's foremen were denying breaks to employees who worked through lunch was direct dealing. As Barbara Grossman testified, more than one of the Respondent's superintendents stated that they had made "deals" with employees to give up their right to a break. (Grossman Tr. 108-09). Mark Pullium testified that his supervisor Danny told him he would be well-compensated if he gave up his break. (Pullium Tr. 146). Brian Leroux testified that he was offered two hours of overtime. (Leroux Tr. 129). This testimony from actual unit employees, not self-serving testimony from the company's

³ The Respondent contends that Leroux's testimony does not prove direct dealing because Leroux never expressly said that the two hours was in exchange for giving up his right to a lunch break later on, a deal which Leroux admitted he did not take. However, the Respondent's argument has no merit as there is no other logical reason for offering Leroux two hours of overtime: the contract doesn't require two hours of overtime, but rather simply time and a half. The entire context of Leroux's testimony concerned the amount that the Respondent was offering employees in exchange for them foregoing their right to a lunch break.

general counsel or less-than-forthcoming testimony from Ms. Jackson, establishes some of the terms of the "deals" that were worked out, contrary to the Respondent's assertion. See Answering Brief at 22.⁴

The Respondent asserts that the judge never found that the employees had a right to a break. (Answering Brief at 18). However, this assertion finds no support in the judge's decision. The judge found that there was no established practice "concerning the *length of time* permitted to get lunch," which is a far cry from saying that there was no established practice of getting a break at all. (ALJD at fn. 5) (emphasis added). This statement from the judge, combined with the judge's finding that some of the Respondent's supervisors were not following Section 14(b) of the contract, strongly indicates that the judge did find that the employees had a right to this break.

The Respondent continues to argue, without any authority, that a direct dealing finding must be preceded by a finding of a unilateral change. (Answering Brief at 15). This analysis would turn direct dealing doctrine on its head, as an employer could simply piece meal a contract to death. Under the Respondent's theory, an employer could bargain with one employee out of a unit, get the employee to surrender his or her contractual rights in exchange for something, and then argue that there was no material change because only one person was affected. Such a reading of the Act would make a farce of the term "exclusive" in "exclusive collective-bargaining representative." As Allied Signal, 307 NLRB 752 (1992) stated:

Our conclusion that the Union had contractually waived its bargaining rights so as to permit unilateral action by the Respondent respecting the smoking policy does not extend to a finding that the Union also agreed

⁴ More importantly, there is no requirement that the Acting General Counsel furnish the details of the deals the Respondent made. It is enough to show that the Respondent bypassed the Union in an attempt to make any kind of deal.

that the Respondent could deal with employees as if the Respondent's work force had no bargaining representative. Direct dealing with employees goes beyond mere unilateral employer action.

Allied Signal, 307 NLRB at 754. Furthermore, to the extent the Board wishes to consider the matter, the Respondent did make a change, as noted above.

The Respondent's attempt to distinguish the cases cited in the Brief in Support is equally unavailing. *Pepsi America*, 339 NLRB 986 (2003) continues to demonstrate that employers may not go around the union to bargain with individual employees to do away with their lunch breaks. This is a simply proposition, and that is all that the Acting General Counsel cited it for.

The Respondent's other arguments are also without merit. The Respondent urges the Board to uphold the judge's credibility determinations. (Answering Brief at fn. 7). However, the judge made no express credibility findings – he never said he was specifically crediting or discrediting any witness. Therefore, there are credibility findings to be upheld. As the Acting General Counsel has argued above, the judge's finding that some of the Respondent's supervisors changed the practice of giving breaks to employees who worked through lunch through bypassing the union, supports a finding of a violation.

The Respondent's assertion that the direct dealing allegation is barred by Section 10(b) because the Union filed one grievance over not getting a lunch break in October 2009 is equally without merit. (Answering Brief at fn. 3). The conduct at issue in this case occurred well within the 10(b) period, and the conduct at issue in the grievance in Respondent's Exhibit 32 from 2009 contains no evidence of, nor in fact any allegation of direct dealing.

CONCLUSION

For all these reasons, and for the reasons in the Acting General Counsel's Brief in Support of Exceptions, the record supports a finding that the Respondent has been engaging in direct dealing. As the judge found, in many instances the Respondent's supervisors are violating the parties' past practice and most recent collective-bargaining agreement by denying breaks to employees who have to work through lunch. The evidence is very strong that the way the Respondent does this is by going around the Union and negotiating separate deals with employees. This is direct dealing, and an appropriate Order should issue.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that this Counsel to the Acting General Counsel's Reply Brief was electronically filed on February 7, 2012, and, on that same day, copies were electronically served on the following individuals by email:

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